No. 80-289

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

J. CRAIG KUHN
MELVIN P. STEIN
JAMES C. KUHN, III
KUHN, ENGLE & STEIN
1512 Frick Building
Pittsburgh, PA 15219
(412) 281-4555

HARRISON COMBS
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Counsel for Petitioners

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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QUESTION PRESENTED

Are trustees of a multiemployer pension and welfare trust fund, established under Section 302(c) of the Labor Management Relations Act of 1947, representatives for the purposes of collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act?

*The other parties to this case are the National Labor Relations Board and Amax Coal Company, a Division of Amax, Inc. The Solicitor General on behalf of the National Labor Relations Board also filed a Petition for a Writ of Certiorari, which was granted on January 19, 1981, at National Labor Relations Board v. Amax Coal Company, a Division of Amax, Inc., No. 80-692. The two cases were consolidated for argument. They present the same question. A joint appendix is submitted for both appeals.

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The opinion of the Court of Appeals for the Third Circuit (Pet. Cert., App.A, 1a-32a*) is reported at 614 F.2d 872. The opinion of the National Labor Relations Board (Pet. Cert., App.D, 43a-227a) is reported at 238 N.L.R.B. No. 214.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1980 (Pet. Cert., App.B, 33a-40a). Both a petition for rehearing and a suggestion for rehearing en banc were denied on May 29, 1980 (Pet. Cert., App. C, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case directly involves Section 8 of the National Labor Relations Act, 29 U.S.C. §158. This case indirectly involves Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186 and certain provisions of the Employee Retirement Income Security Act of 1947, 29 U.S.C. §§1001 *et seq.* These provisions are set forth in Appendix E, pages 227a-255a, of the Petition for Certiorari.

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*References to materials contained in Appendix to the Petitions for Certiorari refer to the Petition filed by the Solicitor General on behalf of the National Labor Relations Board.

STATEMENT OF THE CASE

Respondent Amax Coal Company, a division of Amax, Inc., operates coal mines, primarily bituminous coal mines in the midwestern United States. Amax bargains with petitioner United Mine Workers of America ("the Union") for its midwestern mines as a member of the Bituminous Coal Operators Association ("BCOA"), a nationwide multiemployer group.

In 1972, Amax opened the Belle Ayr Mine in Wyoming, its first sub-bituminous surface mine. Although that mine did not become a member of BCOA, Amax and the Union agreed to a contract regarding the Belle Ayr Mine, which contained many of the same provisions as the BCOA contract. In January, 1975, after the initial Belle Ayr Mine Contract had expired, the Union struck the Belle Ayr Mine, and the Union and Amax began direct negotiations over the terms of a contract for that mine.

By mid-March, 1975, the parties had reached an impasse on several issues, including the Union's proposal that Amax continue to contribute to the Union's existing national pension and welfare trust funds.[1] These funds, which provide comprehensive health and retirement benefits to coal miners and their families, were established through irrevocable trusts pursuant to Sec-

---

1. Included in the contract proposals submitted by the Union were the UMWA 1974 Benefit Plan & Trust (Joint Exhibit 14(a)), the UMWA 1974 Pension Plan (Joint Exhibit 14(b)) and the UMWA 1974 Pension Trust (Joint Exhibit 14(c)). The UMWA 1974 Pension Plan and the UMWA 1974 Pension Trust are printed in the consolidated Joint Appendix at 245-270 and 271-282.

tion 302(c) (5) of the Labor Management Relations Act of 1947.[2]

Amax had contributed to these funds with regard to its Belle Ayr employees under the initial Belle Ayr Mine Contract, and the Union insisted to the point of impasse on continuation of that participation. After impasse was reached, Amax on March 17, 1975 offered work to its striking employees upon the terms of its last proposal, including its own employee benefit program. No agreement was subsequently reached by the parties.

Amax then filed unfair labor practice charges, and the General Counsel of the National Labor Relations Board issued a complaint alleging, *inter alia,* that the Union and its Local No. 1854 had violated Section 8(b) (1) (B) and 8(b) (3) of the National Labor Relations Act, 29 U.S.C. §§158(b) (1) (B), (b) (3), in that they "adamantly insisted on the inclusion of Pension and Health and Welfare Trusts Provisions, by the terms of which the trustees of those trusts, who would be collective bargaining representatives, would not be selected by the Employer." (J.A. 8, 15)

The Board unanimously concluded that the Union violated neither Section 8(b) (1) (B) nor 8(b) (3) by bargaining to impasse and striking in support of its proposal that Amax continue to contribute to the Union's existing national pension and welfare trust

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2. These funds had three trustees previously appointed in accordance with Section 302(c) (5) (B) : one appointed by the employers, another appointed by the Union, and a neutral trustee selected by the two trustees. Amax through its membership in BCOA had participated in the selection of the employer-appointed trustee.

funds with regard to the Belle Ayr employees. Noting that proposals concerning employer contributions to employee benefits funds are unquestionably mandatory subjects of bargaining, the Board concluded that the Union's insistence on Amax's participation in an existing trust fund was not unlawful because coerced agreement with respect to a preselected management-appointed trustee of an existing multiemployer trust fund is not coercion with respect to selection of a collective bargaining representative. Affirming in relevant part the decision of the administrative law judge, the Board held that "the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act." (Pet. Cert. App. C, 57a)

The Board explained that the trustees of a jointly administered, multiemployer trust fund instead "are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan." (Pet. Cert., App.C, 58a) Since the trustees of a fund established under Section 302(c)(5) of the LMRA are not collective bargaining representatives, the Union's demand that Amax contribute to the existing trust funds did not restrain or coerce Amax in violation of Section 8(b)(1)(B), even though the management trustee of the fund had previously been selected. Accordingly, the Board dismissed the portion of the complaint that alleged violations of Section 8(b)(1)(B) and 8(b)(3) based on the Union's insistence on Amax's continued participation in the pension and welfare funds (Pet. Cert., App.C, 59a).

The Court of Appeals reversed and held that such trustees are collective bargaining representatives covered by Section 8(b)(1)(B) of the NLRA. Relying on its prior decision in *Associated General Contractors of*

Essex County, Inc. v. *Laborers International Union,* 559 F.2d 222, 227-228 (3d Cir. 1977), the Court stated:

> Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the Union in the ongoing collective bargaining process between them.

The Court of Appeals accordingly concluded that the Union had coerced Amax in its selection of a collective bargaining representative and had unlawfully refused to bargain insofar as the Union had insisted on its proposal that Amax continue to contribute to the Union's existing national trust funds whose trustees had previously been selected. The Court therefore ordered the Union to cease and desist from "insisting to the point of impasse that Amax participate in the [Union's] multi-employer pension and welfare funds." (Pet. Cert., App. B, 36a)

In its opinion the Court of Appeals stated:

> Accordingly, we hold that the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's Pension and Trust Fund violates Section 8(b)(1)(B) and 8(b)(3). (Pet. Cert., App.A, 14a)

This "holding" must be read in context with the preceding language of the opinion, since, standing alone, it conflicts with the existing law of mandatory subjects of bargaining expressed in *Inland Steel Co.,* 77 N.L.R.B. 1 (1948), *enforced* 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949).

SUMMARY OF ARGUMENT

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." That section is a narrowly focused provision, enacted to preclude union attempts to dictate employers' choice of their representatives in the collective bargaining process. The process of trust fund administration is of a far different order from the duties of collective bargaining agents. The congressional purpose behind Section 8(b)(1)(B) does not extend to fund trustees.

Congress intended that welfare and pension funds established under the provisions of Section 302(c)(5) of the LMRA be real trusts and that their trustees owe a sole and undivided fiduciary duty to the fund's participants and beneficiaries. The courts have given effect to this congressional purpose, refusing to recognize agency relationships between trustees and their appointing parties. The fiduciary responsibilities imposed by Section 302 and ERISA and recognized by the courts cannot be reconciled with the duty of total loyalty to appointing parties imposed under Section 8(b)(1)(B).

The Third Circuit's decision expands the reach of Section 8(b)(1)(B) and places all ERISA trustees in a position of unreconcilable conflict of loyalties. The decision is in error, and should be reversed.

ARGUMENT

I. Congressional Definition Of Restraint Or Coercion In The Selection Of Collective Bargaining Representatives In Section 8(b)(1)(B) Of The LMRA As A Union Unfair Labor Practice Was Not Intended To Include Taft-Hartley Trustees Under Section 302(c)(5) Of That Act.

The proscription of union efforts to dictate the choice of collective bargaining representatives by employers was drawn with a specific narrow focus on the collective bargaining and grievance adjustment process. The statutory scheme of unfair labor practice regulations was not drawn broadly to include management employees or supervisors engaged otherwise than in the bargaining and grievance process.

In *Florida Power & Light Co. v. IBEW Local 641,* 471 U.S. 790 (1974), this Court held that Section 8(b)(1)(B) cannot be so broadly read as to forbid union discipline of supervisors from performing bargaining unit work during a strike, and stated the following:

> Both the language and the legislative history of §8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two separate and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances," and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers

who would represent them in collective bargaining and grievance adjustment. *Id.* at 803.

In that case the NLRB had extended a line of cases interdicting union discipline of supervisor-members based on the rationale that partisan loyalty required the immunity of supervisory employees from union discipline. Conceding the conflict of loyalties, this Court nevertheless refused to approve the extension of Section 8(b)(1)(B) jurisdiction beyond the area of the clearly focused congressional intent.

In this case the Court of Appeals has extended Section 8(b)(1)(B) to trust administration as an "ongoing collective bargaining process" (Pet. Cert., App.A, 13a, quoting its *dictum* in *Associated Contractors of Essex County, Inc. v. Laborers International Union,* 559 F.2d 222, 227 (3rd Cir. 1977)).

But, as was observed in *Allied Chemical and Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Company,* 404 U.S. 157, 170 (1971), ". . . the union's role in the administration of the [pension] fund is of a far different order from its duties as collective bargaining agent."

The collective bargaining process is recognized as directed to "entering into a collective bargaining agreement," *NLRB v. Insurance Agents International Union,* 361 U.S. 477, 485 (1960). Trust administration is otherwise directed. It involves many different kinds of responsibilities, from eligibility determinations for pension or health benefits through choices of insurance carriers and policies, investments, to costs of administration, and selection of actuaries, accountants and administrators. As to these, for which there are ranges of discretion controlled by Section 302(c) of the LMRA and by the fiduciary provisions of ERISA, it cannot be

said that there are any clearly management or labor "positions" in the sense in which collective bargaining stands are taken.

It is, therefore, erroneous to regard trustees as collective bargaining representatives. Congress never intended to define the bargaining process so widely as to include them. The conflicts in administration which follow from such a holding do nothing to further the bargaining process. A bargaining representative is bound by agency principles of loyalty to the employer or the union he represents.

Section 8(b)(1)(B) was intended to assure that an employer's bargaining representative ". . . be completely loyal to its desires," *Local No. 2150, IBEW,* 192 N.L.R.B. 77, 78 (1971). But the decision of the Court of Appeals in this case speaks in terms which qualify that complete loyalty "insofar as it is consistent with their fiduciary obligations . . ." to the beneficiaries. (Pet. Cert., App.A, 13a) A bargaining representative whose power to act for his principal is subordinated to the interests of fund beneficiaries cannot perform his bargaining functions as Congress envisioned them and as this Court has interpreted them.

A bargaining representative for a union may not interfere with the employer's representative in performing his supervisory functions, including grievance adjustment, in accordance with his principal's instructions. *American Broadcasting Companies v. Writers Guild,* 437 U.S. 411, 436 (1978). If trustees are bargaining representatives, however, as the Court of Appeals decision holds, then a union-appointed trustee who acts to prevent an employer-appointed trustee from breaching his ERISA duties to the fund beneficiaries would

commit an unfair labor practice. Section 8(b)(1)(B) was not intended to create such incongruous results. Congress intends reasonable interpretation of its statutes. The National Labor Relations Board gave Section 8(b)(1)(B) the intended, reasonable interpretation when it dismissed the charges under Sections VI(b) and XVII(j) of the Consolidated Amended Complaint. The Court of Appeals erred in its contrary determination.

II. The Trustees Of The Union's Pension And Welfare Funds Are Fiduciaries Whose Sole Responsibility Is To The Beneficiaries And Participants Of The Funds.

Section 302 of the LMRA, which prohibits payments or loans to employee representatives, labor organizations and their officers and employees, in subsection (c)(5) exempts from the prohibition ". . . payments to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents). . . ." The detailed provisions which follow specify the appointment of trustees by unions and employers with a neutral to break deadlocks. Those provisions are set forth at pages 232a-233a of the Solicitor General's Petition for Certiorari on behalf of the NLRB.

In establishing a form of supervision over welfare and pension funds in Section 302, Congress chose to require the use of a formal trust with fiduciary obligations to the beneficiaries. Senators Ball and Taft, speaking in support of the provisions of Section 302, explained to

their colleagues that it was drawn to make sure that ". . . the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; *that it is a trust fund . . .*" (93 Cong. Rec. 4750 (1947)) (Remarks of Senator Ball) (Emphasis supplied); ". . . to require that the fund shall be established in definite, detailed form, *in the form of a trust fund . . .*" (93 Cong. Rec. 4747 (1947)) (Remarks of Senator Taft) (Emphasis supplied).

This Court early noted, in *United States v. Ryan,* 350 U.S. 299 (1956), that the United Mine Workers' contract demand for a welfare fund of $.10 for each ton of coal mined had caused the ultimate enactment of Section 302 of the Taft-Hartley Act to assure that such funds would not be used ". . . as individual officers saw fit." *Id.* at 304.

The congressional purpose in adopting Senator Ball's amendment, which became Section 302(c)(5) of the LMRA, was recognized by this Court in *Arroyo v. United States,* 359 U.S. 419 (1959). That choice meant that the Congress set specific standards ". . . to assure that welfare funds would be expended only for the purposes for which they were established." *Id.* at 426.

Decisions in the courts of appeals and the district courts have applied the principles of the law of trusts and the fiduciary responsibility of trustees of Taft-Hartley trusts in a number of cases. In all except the decision in this case by the Court of Appeals for the Third Circuit, the primacy of trust law principles has been recognized and rigorously enforced.

The District of Columbia Circuit has more than once considered the contention that trustees are agents for their appointers and has consistently rejected it.

Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied* 393 U.S. 873 (1968), was an action to compel the trustees of the UMWA 1950 Welfare and Retirement Trust to enroll the plaintiff as a pensioner. On appeal from summary judgment denying his claim, it was asserted on his behalf that the trustees as collective bargaining agents owed him a duty of fair representation under the labor laws, separately from his claim as a trust beneficiary. The Court of Appeals rejected the argument with this statement:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employer or the union. Accord, *United Marine Division I.L.A. v. Essex Transportation Co.,* 216 F.2d 410, 412 (3rd Cir. 1954). *Id.* at 865 n.5. (italics in original)

When the power of the District Court to exercise its ancillary jurisdiction over the administration of the 1950 UMWA Welfare and Retirement Fund came before the Court of Appeals for the District of Columbia in *Lamb v. Carey,* 498 F.2d 789 (D.C. Cir. 1974), *cert. denied sub nom. Carey v. Davis,* 419 U.S. 869 (1974), that court affirmed enforcement of strict fiduciary standards. After observing the unique character of Taft-Hartley Trusts because of the contractual nature of the obligation of employers to make contributions for the benefit their employees, and the concern of Congress that employers and employees be represented in trust administration, the court stated the following:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the Beneficiaries. *Id.* at 793

Most recently, the District of Columbia Court of Appeals, in a decision handed down February 5, 1981, in *Robinson v. United Mine Workers of America Health and Retirement Funds,* No. 78-2047 (D.C. Cir. Feb. 5, 1981), held that Section 302 of the LMRA forbids arbitrary or capricious decisions by those who administer trust funds. Notwithstanding financial and actuarial factors which parties to labor agreements may consider in bargaining revisions in eligibility for benefits, Section 302(c) sets limits on the kinds of rules which may be formulated.

> What is essential is that the eligibility rules themselves not be arbitrary or capricious in content when measured against the governing statute. *Id.* slip opinion at 13

A concurring opinion noted the absence of a reasoned decision by both sides in bargaining about revised eligibility for health benefits. A dissenting opinion observed the difference of financial consideration, including death benefits, of active miners and retirees and their families. A petition for rehearing is pending in the case. Whatever the ultimate outcome may be, the decision stands for the application of trust principles rather than collective bargaining standards to the rights of trust beneficiaries. Collective bargainers, in negotiating changed eligibility standards, are bound to the standard of fiduciary duty to the trust beneficiaries, which is higher than that applicable to good-faith col-

lective bargaining. *Id.*, slip opinion at 13-14, n. 52, concurring opinion, 1, 5.

The Court of Appeals for the Third Circuit, in *United Marine Division, I.L.A. v. Essex Transportation Co.*, 216 F.2d 410 (3rd Cir. 1954) in an opinion by Judge Goodrich, held that Taft-Hartley trustees

> . . . were not . . . representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act are carefully spelled out.—*Id.* at 412

The comments of Senators Taft and Ball in explanation of the provisions which were adopted in Section 302 (c) (5) of the LMRA were quoted in support of that decision.

Subsequently, the same Court of Appeals, in *Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420*, 265 F.2d 607 (3rd Cir. 1959), once again had before it the provisions of Section 302(c) (5) of the LMRA, this time in connection with contributions to an "Industry Fund" set up with trustees appointed by an association of employers and by the union under an agreement entered into pending a determination of the legality of the purposes set forth in a proposed declaration of trust. Those purposes included, among others, paying the operating costs of the employers' association including public relations, paying the em-

ployers' costs of collective bargaining on an industry-wide basis, and paying for facilities for arbitration and adjustment of grievances.

The court followed its earlier decision in *United Marine Division, I.L.A. v. Essex Transportation Co., supra,* and this Court's decision in *United States v. Ryan, supra,* and held that payments to the joint board, which were concededly not within the scope of the permitted exceptions of Section 302(c)(5) trusts, were unlawful under the provisions of Sections 302(a) and 302(b) of the LMRA. Strict adherence to the terms of Section 302(c)(5) was enforced.

Section 302 was again stringently interpreted and applied by the Third Circuit Court of Appeals in *Nedd v. United Mine Workers,* 556 F.2d 190 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978), where that court determined the availability of a damage action as a remedy for alleged breach of duty to pension beneficiaries, stating:

> Recognition of a derivative cause of action for the recovery of money for the trust is consistent with the overall statutory purpose of §302(c)(5)—the preservation of the trust corpus for its intended beneficiaries.—*Id.* at 204-5

The reasoning of the cases decided by the courts of the District of Columbia and Third Circuit has been followed in opinions of the Court of Appeals for the Ninth Circuit. *Toensing v. Brown,* 528 F.2d 69 (9th Cir. 1975) involved a claim that trustees had failed to exercise an independent judgment in granting larger increases to active employees than to retirees. The district court held that the trustees exercised a proper dis-

cretion, citing, *inter alia, United Marine Division, I.L.A. v. Essex Transportation Company, supra,* as well as this Court's opinion in *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). The Court of Appeals affirmed the decision, applying the standard of review for trustees' decisions, and observing:

> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under §302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory. Although two of the trustees may have had a misconception about the weight to be accorded to recommendations of the collective bargaining parties, ten of the fourteen trustees voted on the planned increases, and the vote in favor was unanimous. No other evidence suggested that the remaining trustees failed to exercise independent judgment. The action of the trustees must be upheld because it was not arbitrary or capricious.—528 F.2d at 72.

In a case in which it reviewed, modified, and in part reversed a decision and order of the National Labor Relations Board, the Court of Appeals for the Ninth Circuit passed upon the contention that a pension trust was the agent of the union which appointed five of its ten trustees, *NLRB v. Carpenters, Local 1913,* 531 F.2d 424 (9th Cir. 1976). The NLRB had held the pension trust to be the union's agent on the basis of the composition of its board of trustees and the power of the

union to remove any or all of the trustees which it appointed at any time.

The Court of Appeals reversed, holding squarely that the trust was not the union's agent:

> It is generally agreed that both agents and trustees are fiduciaries, but there are significant differences between the two. An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust; he is an agent only if he agrees to hold title for the benefit and *subject to the control of another*. Restatement 2d, Agency §14B; Restatement 2d, Trusts §8. Unless the Union can be said to have control of the operations of the Trust, the Trust should not be treated as the Union's agent. Id. at 426-7 (Italics in original)

The black letter text of the cited section of the Restatement (second) of Trusts is short and direct:

> **§8. Trust and Agency**
>
> **An agency is not a trust.**

This basic distinction echoes the words of Senators Taft and Ball when they spoke on the floor of the Senate explaining their purpose in the provisions of the Ball Amendment, which became Section 302 of the Taft-Hartley Act, and quoted hereinabove above at page 11 of this argument, to make sure that the fund is a *trust fund.*

In *Blankenship v. Boyle,* 329 F. Supp. 1089 (D.D.C. 1971), the District Court for the District of Columbia reviewed the actions of trustees of an earlier UMWA trust. The court enforced strict trust law principles. In

granting mandatory relief against breaches of trust the court observed the purpose of Congress in adopting the trust mechanism as the legal means of protecting the beneficiaries. The Opinion of the court contains the following statement:

> The Congressional scheme was thus [by the requirement of a neutral trustee] designed not to alter, but to reinforce "the most fundamental duty owed by the trustee": the duty of undivided loyalty to the beneficiaries. 2 Scott on Trusts §170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held.—*Id.* at 1095

A carefully analytical commentary, Welch and Wilson, *Applicability of Traditional Principles of Trust Law to Union and Management Representatives Administering Taft-Hartley Trusts,* 23 Lab. L. J. 671 (1972), contains a clear and comprehensive survey of the subject and the decisions.[3]

Its authors concluded that trust law principles govern the administration of Taft-Hartley trusts, to the exclusion of any agency relationship of trustees to their appointing unions, employers, or employer associations. Their conclusion took into account the legislative history, the practical administration of such trusts, and the

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3. Earlier scholarly commentary on the Taft-Hartley Act was not as clear. Professor Archibald Cox apparently did not perceive that the use of the trust as a means of protecting employee welfare and pension funds would work as effectively as state regulation of mutual savings banks and mutual insurance companies, or that multiemployer trusts were possible under the provisions of Section 302(c)(5) of the LMRA: Cox, *The Labor Management Relations Act,* 61 Harv. L. Rev. 274, 290 (1947), cited in *Arroyo v. United States, supra.*

tendency of then pending legislation having to do with regulation of pension plans toward "greater control, greater fiduciary responsibility, swifter and more complete remedies." *Id.* at 678. The legislation enacted by Congress since that article was written has been consistent with that analysis, as the discussion below of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multiemployer Pension Plan Amendments Act of 1980 will demonstrate.

III. ERISA And The Multiemployer Pension Plan Amendments Act of 1980.

If there were any doubt remaining as to Congressional policy with respect to the character of the trusteeships under Section 302(c)(5) of the LMRA, it must surely be dispelled by the stringent provisions of ERISA defining the fiduciary duties of trustees of employee benefit trusts. That comprehensive regulatory statute and the 1980 Multiemployer Pension Plan Amendments Act carry forward the continuing concern of Congress with the fiduciary nature and financial soundness of the pension funds which have been built up by the labor of millions of American wage and salary workers.

The provisions of ERISA are clear and unambiguous in imposing liability on a fiduciary for breach of duty generally or engaging in specified prohibited transactions: ERISA §§404, 405 and 406, 29 U.S.C. §§1104, 1105 and 1106.

A fiduciary is required to "discharge his duties with respect to a plan *solely* in the interests of the participants and beneficiaries—and (A) for the *exclusive* purpose: of providing benefits to participants and their beneficiaries", ERISA, §404(A)(1), 29 U.S.C. §1104(A)(1) (Emphasis supplied).

Argument.

Fiduciaries are not permitted to act "in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b)(2).

If there is room for interpretation of this clear language, judicial decision and legislative history provide it.

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979), decided by the same court of appeals which construed the same statute in this case in 1980, involved a transaction by which trustees of two multiemployer plans serving many of the same beneficiaries sought to obtain approval from the Secretary of Labor of a loan to one trust, a health and welfare plan which was experiencing cash deficiencies, from the other, a pension trust with assets available to lend. The trustees were the same for both trusts and the plan administrator which served both trusts recommended the transaction.

The pension trustees had deadlocked, three of them questioning the propriety of the loan in light of their fiduciary responsibilities under ERISA. The impartial umpire appointed under Section 302(c)(5) decided that the transaction was not prohibited by ERISA. The loan transaction was consummated.

Later, the Secretary of Labor, following an investigation, wrote to the pension trustees and informed them that they had acted in a transaction involving the plan on behalf of a party (the welfare plan) whose interests were adverse to the interests of the plan, its participants, or beneficiaries, that they might be held personally liable under §409 of ERISA, 29 U.S.C. §1109, and that in future

transactions between the plans, they should seek prior exemptions under §408 of ERISA, 29 U.S.C. §1108.

Because the letter of the Secretary of Labor caused problems with fiduciary liability insurance carriers, the trustees sought a declaratory judgment nullifying the letter and its interpretation of the Act. The District Court granted the relief sought, and the Secretary of Labor appealed.

The Court of Appeals held as follows:

> With this framework, the issues are resolved by a simple exercise in statutory construction. Does §406(b)(2) [of ERISA] prohibit transactions "adverse" in the technical sense asserted by the Secretary, or must a transaction exhibit fiduciary misconduct, reflecting harm to the beneficiaries, before the statute is violated? We endorse without reservation the interpretation of the Secretary. When identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a §408 exemption, a per se violation of ERISA exists. *Id.* at 529

That court adverted to congressional policy without recourse to committee hearings and reports, quoting the statement of findings and policy from Section 1 of ERISA, 29 U.S.C. §1001. It concluded that Congress intended ERISA fiduciary standards "to apply to plans formerly governed only by the Taft-Hartley Act," *Id.* at 530.

If recourse is had to committee hearings and reports, those secondary aids to statutory construction speak the same language of fiduciary responsibility to

the beneficiaries of the trust, to the exclusion of any other interest. The House Conference Report on ERISA contains explanations in its long discussion of the fiduciary standards sections of the bill as it was ultimately enacted, all of which confirm the continuing intent to require traditional trust law principles as the means of enforcing the rights of beneficiaries and participants as the exclusive allegiance of the trustees.

Under the heading "exclusive benefit for employees" the conferees explained as follows:

> Under the conference substitute *each fiduciary of a plan must act solely in the interests of the plan's participants and beneficiaries and exclusively to provide benefits to these participants and beneficiaries* (or to pay reasonable plan administrative costs). H.R. Conf. Rep. No. 93-1280, 930 Cong. 2d Sess. 5083 (1974) (Emphasis supplied).

Later in the same report they affirmed their intention to employ the principles of trusteeship with court enforcement in the following paragraph:

> *Prohibited Transactions*
>
> *In General.*—The conference substitute prohibits plan fiduciaries and parties-in-interest from engaging in a number of specific transactions. Prohibited transaction rules are included both in the labor and tax provisions of the substitute. Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. *This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts.—Id.* at 5087. (Emphasis supplied).

They gave the following clear expression of their intention to prevent conflicting loyalties from frustrating a trustee's performance of his exclusive duty to the plan beneficiaries and participations in a section headed "Additional Prohibitions":

> In addition, the labor provisions . . . prohibit a fiduciary from acting in any transaction involving the plan *on behalf of a person (or representing a party) whose interests are adverse to the interests of the plan or of its participants or beneficiaries. This prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of the plan's participants and beneficiaries.*—*Id.* at 5089. (Emphasis supplied).

Most recently, Congress adopted the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, Sept. 26, 1980, 94 Stat. 1209, in which it made additional findings and declaration of policy to provide, *inter alia,* reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans and a financially self-sufficient program for the guaranty of employee benefits under multiemployer plans. In debates on the floor of the Senate, Senator Randolph asked for confirmation that that amendatory bill was intended to reaffirm the present law,

> . . . that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? * * * I do not believe that we in the Congress have ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers.

and was answered by the bill's sponsor

> Mr. Williams. I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind. That was, that is, that will be.
>
> —126 Cong. Rec. S 10104 (Daily Ed. July 29, 1980)

In the House of Representatives, Representative Thompson spoke directly to the question which is before the court in this case, demonstrating with certainty that the Congress recognized the error of the Court of Appeals decision:

> Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect congressional intent.
>
> —126 Cong. Rec. H 7902 (Daily Ed. Aug. 26, 1980)

What Congress did in its 1980 amendment, while it may not establish what it meant in 1947 and 1974, is nevertheless a relevant consideration, which courts may properly take into account, in determining the effect of earlier legislation, of which the later law is another major step. *NLRB v. Allis-Chalmers Manufacturing Co.,*

388 U.S. 175, 194 (1967); *NLRB v. Drivers Local 639*, 362 U.S. 274, 291-2 (1960).

The congressional policy toward pension and welfare trusts expressed in the 1980 legislative debates conforms to the pattern of federal labor law as it has developed since the adoption of the LMRA in 1947. The administration and enforcement of the statutes relating to labor and employee benefits is a complex field in which Congress has paid careful attention to the responsibilities of different agencies of government. The National Labor Relations Board, the Treasury Department, the Labor Department, and the courts each have important administrative and enforcement powers, duties and responsibilities, the scope of which are determined by Congress.

With respect to pension and welfare plans, Congress made the original choice of the trust as the legal means of assuring that such plans are administered for the sole benefit of the beneficiaries and participants through the application of the principles of trust law and fiduciary duty. Congress chose not to mandate administrative supervision and enforcement of trust administration, as it might have done if it had perceived the trust relationship as an extension of the collective bargaining process.

The National Labor Relations Board, which is charged with enforcement of the federal labor laws, has concluded that Congress did not intend that the Board regulate the exercise of fiduciary duties by fund trustees. *Sheet Metal Workers International Association and Central Florida Sheet Metal Contractors Association, Inc.*, 234 N.L.R.B. 1238 (1978) *pet. for review pending* (5th Cir. No. 79-2396). The Third Circuit's decision

pays no deference to this Board determination, but instead requires the Board to assume concurrent responsibilities over a substantive area already committed to the courts and the Secretary of Labor under the LMRA and ERISA.

Congress did not intend a conflict among agencies committed with enforcing labor and pension laws. In enacting and amending ERISA it spelled out the functions of the Secretary of Labor and the Secretary of the Treasury. Had it intended to confer additional unfair labor practice jurisdiction upon the National Labor Relations Board, it would not have done so *sub silentio* in legislation as closely drawn and thoroughly considered as the LMRA and ERISA and their amendments. But if trust administration is collective bargaining, then the NLRB will have regulatory power over trustees under Sections 8(a)(5), 8(b)(3) and 8(d). Labor laws are not to be interpreted by the NLRB or the courts so as to usurp "major policy decisions properly made in Congress" or to move the NLRB "into a new area of regulation which Congress has not committed to it", *Ford Motor Company v. NLRB,* 441 U.S. 488, 497 (1979).

Moreover, if the Court of Appeals decision is the law, then the obligation of collective bargaining representatives to provide fair representation to members of collective bargaining units, whether union members or not, would open the district courts to actions by pension beneficiaries under §301 of the LMRA, a jurisdiction which the District of Columbia Circuit Court of Appeals denied in *Miniard v. Lewis, supra.* Under §502 of ERISA, 29 U.S.C. §1132, actions by beneficiaries are specifically and fully provided for. Fair representation as a basis of jurisdiction would contribute nothing to the law.

Argument.

If the decision of the Third Circuit Court of Appeals stands, the advantage of multiemployer plans in stability and cost savings will be lost to small individual pension plans. Existing multiemployer welfare and pension plans will exist only so long as independent signatories choose not to withdraw; their withdrawal will be a nonbargainable license to shop for cheaper programs in smaller actuarial groupings, contrary to the policy of Congress, declared in ERISA, and its 1980 Multiemployer Pension Plan Amendments Act, to promote the soundness and stability of plans, 29 U.S.C. §§1001 and 1001(a).

More than 8.8 million employees and pensioners were estimated by the Department of Labor as having interests in multiemployer funds with more than $22,000,000,000 in assets in 1975. Department of Labor, *Pension and Welfare Benefit Programs:* Study of Multi-Employer Plans I-2, I-10, IV-5 (1979). The interests of these beneficiaries and participants will be put in serious jeopardy by the effects of the decision of the Third Circuit Court of Appeals. It should be reversed.

CONCLUSION

The rights of beneficiaries of trusts created in conformity with Congressional specifications are entitled to be treated as the national legislature has consistently described them and as the courts have, until now, respected them—as beneficiaries of trusts, not as third party beneficiaries of the collective bargaining agreements between their employers and unions.

The judgment of the Court of Appeals with respect to Amax's participation in the Union's Multiemployer Pension Welfare Trusts should be reversed.

Respectfully submitted,

HARRISON COMBS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

J. CRAIG KUHN
MELVIN P. STEIN
JAMES C. KUHN, III
KUHN, ENGLE & STEIN
1512 Frick Building
Pittsburgh, Pa. 15219

Counsel for Petitioners